68 FR 55589, September 26, 2003

A-570-882
Investigation
Public Document
AD/CVD/I/2: JM

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey May
Deputy Assistant Secretary, Group I
AD/CVD Enforcement

DATE: September 18, 2003

SUBJECT: Issues and Decision Memorandum for the Antidumping Investigation of Refined Brown Aluminum Oxide (Otherwise Known as Refined Brown Artificial Corundum) from the People's Republic of China

Summary

We have analyzed the comments of the interested parties in the antidumping investigation of refined brown aluminum oxide (RBAO) from the People's Republic of China (PRC). As a result of our analysis of the comments received from interested parties, we have made changes in the rate assigned to the sole respondent in this case, Zibo Jinyu Abrasive Co., Ltd. (Jinyu). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from parties.

1. Use of Adverse Facts Available for Critical Circumstances
2. Seasonal Trend for Jinyu's Shipments
3. Surrogate Value for Crude Brown Aluminum Oxide
4. Application of Verification Findings

Background

On May 6, 2003, the Department of Commerce (the Department) published its preliminary determination in the antidumping investigation of RBAO from the PRC. See Notice of Preliminary Determination of Sales at Less Than Fair Value: Refined Brown Aluminum Oxide (Otherwise known as Refined Brown Artificial Corundum or Brown Fused Alumina) From the People's Republic of China,

68 FR 23966 (May 6, 2003) (Preliminary Determination). The product covered by this investigation is refined brown aluminum oxide (RBAO). The petitioners and interested third parties requested a hearing, which was held at the Department on August 20, 2003. The period of investigation (POI) is April 1, 2002, through September 30, 2002.

We invited the parties to comment on our preliminary determination. We received comments from the following parties: the petitioners, C-E Minerals, Treibacher Schleifmittel Corporation, and Washington Mills Company, Inc.; the respondent Jinyu; and interested third parties Allied Mineral Products, Inc., Cometals, a Division of Commercial Metals Company, Saint-Gobain Corporation, Dauber Company, Inc., Golden Dynamic Inc., China Abrasives Import and Export Corporation, and White Dove Group Import and Export Inc. (hereinafter interested third parties). Based on our analysis of the comments received, we have changed the results from those presented in the preliminary determination.

Margin Calculations

We calculated export price and normal value (NV) using the same methodology stated in the preliminary determination, except as follows:

- We used the value reported in the Defense Logistics Agency FY2000 Annual Report as the surrogate value for crude brown aluminum oxide (CBAO). See Comment 3.

- Based on our verification findings, we have included an additional sale of the subject merchandise in our final determination analysis. Jinyu had inadvertently omitted this sale in its original reporting. See Comment 4.

- We revised Jinyu's reported consumption of electricity by allocating electricity consumption only to the brown and white aluminum oxide production, based on our verification findings. See Comment 4.

- We recalculated Jinyu's labor factor by allocating labor based on actual production, rather than theoretical production, based on our verification findings. See Comment 4.

- We did not add a separate packing labor factor to our NV calculation to avoid double-counting because we found at verification that the reported packing labor is part of the production line labor, which is already accounted for in the direct labor factor of the NV calculation.

Discussion of the Issues

Comment 1: *Use of Adverse Facts Available for Critical Circumstances*

In the preliminary results, the Department made an affirmative finding of critical circumstances for the

sole respondent, Jinyu, as well as for the PRC entity. The affirmative preliminary finding of massive imports with regard to Jinyu was based on Jinyu's own shipment data (see April 29, 2003, Memorandum to the File, entitled Jinyu Shipment Data Analysis). As none of the other parties responded to the Department's requests for information, we relied on adverse facts available (AFA) for the margin rate applicable to the PRC entity (i.e., the PRC-wide rate). Therefore, the Department found that the use of AFA was also warranted in the critical circumstances analysis for the PRC entity.

As AFA in our preliminary critical circumstances determination for the PRC entity, we relied on the U.S. import statistics through February 2003 (the latest month for which such data was available for the preliminary determination), after adjusting for United States Harmonized Tariff Schedule (HTSUS) classification errors acknowledged by the petitioners (see the petitioners' April 14, 2003, letter). The adjusted import statistics showed an increase in imports that was significantly greater than 15 percent. See April 29, 2003, Memorandum to the File entitled Preliminary Determination Import Statistics Analysis for Critical Circumstances.

Following the preliminary determination, it was brought to the Department's attention that the import statistics which the Department relied upon in its preliminary determination contained several HTSUS classification errors by both the petitioners and interested third party importers. In order to clarify the record information for the final determination, the Department analyzed customs entry data to corroborate entry information that was submitted by the parties. The Department found that, even after making these adjustments, the requisite surge in imports (i.e., greater than 15 percent) still existed. See July 17, 2003 Memorandum to File entitled Review of Customs Entry Data Used in Preliminary Critical Circumstances Determination (Customs Entry Data Memorandum).

The Department's preliminary affirmative finding on the first prong of the critical circumstances analysis, a history of dumping, is not being disputed by the parties. See section 733(e)(1)(A)(i) of the Act. The parties are contesting the second prong of the Department's critical circumstances analysis, i.e., the affirmative preliminary finding of a massive surge in imports. See section 733(e)(1)(A)(ii) of the Act.

The interested third parties contend that, based on properly adjusted HTSUS import data, critical circumstances do not exist. The interested third parties argue that the Department's revised analysis after the preliminary determination failed to include RBAO originally misclassified by two interested third party importers, Cometals and another importer. See June 9, 2003, letter from Allied Mineral Products, Inc. et al. They contend that, if these two additional misclassifications are accounted for, a surge in imports greater than 15 percent does not exist. The interested third parties further argue that, when applying AFA, the Department must rely on actual, corroborated facts. They assert that the Department may not draw an adverse inference based on import statistics where, as in the instant matter, these statistics have been thoroughly discredited. Accordingly, the interested third parties contend that the Department must base its critical circumstances analysis for the parties other than Jinyu on the fully corrected import data. The interested third parties argue that, when fully corrected (i.e., when the misclassifications of Cometals and another importer discussed above are also taken into

account), the import data demonstrates that there were no massive imports of subject merchandise during the POI and thus no critical circumstances.

The petitioners argue that the Department should continue to apply AFA in determining critical circumstances for the non-responding companies. According to the petitioners, since the respondents other than Jinyu refused to respond to the Department's questionnaires, they are subject to an adverse inference. They assert such treatment is consistent with well-established practice. As such, the petitioners maintain that the Department should not rely on the aggregate import statistics when applying AFA to the PRC entity. The petitioners argue that doing so would allow non-responding respondents whose own, company-specific, shipment data show massive imports, to escape an affirmative critical circumstances determination if the country- wide imports are not massive. Furthermore, the petitioners argue that the interested third parties' analysis is incomplete and self selected, as it only adjusts for the imports of three importers and the petitioners during the month of September 2003.[1]

In the alternative, the petitioners argue that, even if the Department considers the aggregate import data for the purposes of determining whether critical circumstances exist for the PRC entity, the aggregate data shows that the imports were massive over a relatively short period following the filing of the petition. The petitioners assert that the Department's July 17 memorandum is based on the most detailed information currently available from the Bureau of Customs and Border Protection (BCBP). The petitioners also point out that the July 17 memorandum indicates that the entry dates reported by nearly all importers, including the petitioners, did not match that of the BCBP database. Finally, the petitioners state that the July 17 memorandum notes that certain importers, including but not limited to the petitioners, acknowledged that CBAO had been misclassified as RBAO, or RBAO misclassified as CBAO, when entered. Accordingly, since the Department took the necessary precautions to account for these misclassifiations, the Department should not overturn its finding of massive imports.

DOC Position:

We agree with the interested third parties that the import statistics are problematic due to a history of reporting misclassifications as evidenced by the information on this record. As such, we agree that the Department should not rely on the U.S. import statistics as the basis for a critical circumstances determination in this instance. However, in the absence of data for the Department to consider in determining whether imports from the non-responding companies are massive, the Department will make an adverse inference. See sections 776(a)(2), 776(b), 782(d) and (e) of the Act. As the petitioners point out, the Department has a well-established practice of making the adverse inference that critical circumstances exist for companies that refuse to comply with the Department's requests for

[1] See Exhibit 12 of interested third parties' June 9, 2003, letter to the Department, in which the interested third parties stated there were twelve importers of the subject merchandise during September 2003.

information. In the past, when mandatory PRC producers or exporters failed to cooperate with the Department, the Department has extended the adverse inference that critical circumstances exist to all PRC companies that did not obtain a separate rate (i.e., the PRC entity). See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from Taiwan, 62 FR 51427, 51437 (October 1, 1997).

Accordingly, the Department finds that the refusal of a company to cooperate provides the basis for the application of facts available, as well as the factual basis for an adverse inference. As no other PRC entity besides Jinyu filed a proper questionnaire response, these entities have failed to cooperate with respect to the critical circumstances information as well. Therefore, the Department will extend the adverse inference that critical circumstances apply to the PRC entity. To do otherwise would have the effect of allowing these companies to obtain a more favorable result by not fully cooperating with the Department's requests for information.

Comment 2: *Seasonal Trend for Jinyu's Shipments*

Jinyu contends that the increases in its shipments during the relevant time period for the critical circumstances analysis cannot be considered "massive" by the Department because the increase in imports is due to a seasonal trend and is in no way related to the filing of the petition. Jinyu argues that the data shows that, for the three years preceding the investigation comparison period, Jinyu's shipments historically increased during the relevant time period by percentages substantially larger than the percentage increase during the investigation comparison period. Given this historical pattern, Jinyu argues that the Department must conclude that a seasonal trend exists that accounts for the increase in its shipments during the relevant time period rather than critical circumstances. Therefore, Jinyu asserts that the Department has no basis for reaching an affirmative critical circumstances determination with respect to its shipments.

The petitioners maintain that the Department should affirm its preliminary affirmative determination on critical circumstances for Jinyu based on Jinyu's company-specific shipment data which indicates a massive surge of imports during the relevant time period. While the petitioners acknowledge that the historical data provided by Jinyu shows increases in the relevant time period for the three years preceding the filing of the petition, the petitioners argue that Jinyu is attempting to characterize the massive imports found by the Department as a seasonal trend, without providing an explanation as to why either production or shipments of RBAO would be affected by the seasons. Therefore, the petitioners state that the Department should reject Jinyu's seasonal trend argument.

DOC Position:

We agree with the petitioners. When a party has argued that seasonal trends accounted for the increase in its shipments, the Department has required the party to explain why this trend was seasonal,

in accordance with 19 CFR 351.206(h). See Notice of Final Determination of Sales at Less Than Fair Value: Honey from the People's Republic of China, 66 FR 50608 (October 4, 2001), accompanying Issues and Decision Memorandum at Comment 2, which articulated that, without evidence from the respondent, the Department will not make a finding of seasonal trends. The Department normally does not find seasonality for products for which production and sale are not linked to the seasons. Furthermore, the Department cannot assume that the nature of the production and sale of the subject merchandise by Jinyu is seasonal, irrespective of how Jinyu chooses to ship the subject merchandise. Jinyu has not provided any evidence that links its shipment data to seasonal changes. Therefore, the Department does not find that a seasonal trend exists for Jinyu's shipments of RBAO, and thus finds that critical circumstances exist with regard to Jinyu. See September 18, 2003, Memorandum to the File entitled Jinyu Shipment Data Analysis for the Final Determination for a quantitative analysis of our determination.

Comment 3: *Surrogate Value for Crude Brown Aluminum Oxide*

In the Department's preliminary determination, the Department valued CBAO based on the POI average unit value derived from U.S. import statistics of CBAO imported from Canada because we were unable to identify a suitable surrogate value for CBAO from India or any other comparable economy.

Both Jinyu and the interested third parties argue that the Department should use the weighted-average price reported in the Defense Logistics Agency FY2000 Annual Report (DLA), submitted by the interested third parties on June 24, 2003, as the surrogate value for the CBAO. They contend that using this data would be consistent with the Department's practice of selecting surrogate values that are of the highest quality, specificity and contemporaneity. Specifically, they argue that the DLA value is of a higher quality than the import statistics used by the Department in its preliminary determination, because the DLA is maintained by a reliable government source that has no relation to this investigation. The interested third parties point out that the only existing CBAO facility in North America is the petitioner Washington Mill's plants in Canada. Thus, they contend that the U.S. import statistics are not objective since the only sources of Canadian CBAO recorded in the U.S. import statistics are the Canadian plants which are affiliated with one of the petitioners. Finally, though not available for the POI itself, Jinyu and the interested third parties argue that the DLA data is reasonably contemporaneous as it was reported only one year prior to the POI.

In the alternative, should the Department choose not to use the DLA price, Jinyu and the interested third parties argue that the Department should use the price quote obtained from an Australian company, Bisley & Company Pty. Ltd. (Bisley), that was submitted by Jinyu in its June 30, 2003, submission. They argue that the Bisley price quote is a more reliable source for the CBAO surrogate value than the U.S. import statistics as it does not contain the same flaws that are prevalent in the import statistics. In particular, Jinyu and the interested third parties argue that the Bisley quote was obtained in a competitive, free-market setting from a market- economy producer that was completely unaware of

the antidumping duty investigation at the time the quote was given. At the very least, Jinyu argues that the Bisley price quote corroborates the
accuracy and reliability of the DLA price. As such, both Jinyu and the interested third parties argue that the DLA price, or in the alternative the Bisley price quote, constitute the best information available to the Department to value the CBAO.

The petitioners argue that the Department should use the price quote from Carborundum Universal Limited (CUMI), an Indian producer of the CBAO, as placed on the record on May 13, 2003. The petitioners argue that statutory guidelines require the use of prices or costs of factors of production (FOPs) in one or more market-economy countries which are at a level of economic development comparable to that of the non-market economy. See section 773(c)(4) of the Act. In contrast to the surrogate values advocated by both Jinyu and the interested third parties, the CUMI price quote identifies the price at which the CBAO is offered for sale in India, a country which the Department has determined to be at a level of economic development comparable to that of the PRC. Furthermore, relying on 19 CFR 351.408(c)(2), the petitioners argue that there is a preference for valuing all FOPs in a single surrogate country. Therefore, according to the petitioners, the Department's use of the CUMI price quote would be consistent with this preference.

The petitioners contend that the CUMI price quote is a more contemporaneous source of market value than the DLA price because the DLA price predates the POI by one to two years. The petitioners also contend that the CUMI price quote is a more credible source of market value than the DLA price, because the CUMI price quote is reflective of a sale made in the ordinary course of trade between typical buyers and sellers, while the DLA price was not based on sales made in the ordinary course of trade as the sales involved the disposal of excess inventory. The petitioners further argue that the CUMI price quote is publicly available information, as a price quote for CBAO from CUMI is available to anyone who requests it. Petitioners contend that, even if the Department finds that this quote is not public information, it should still be used by the Department as it accurately identifies the price at which CBAO is sold in India. Therefore, the petitioners argue that the CUMI price quote meets the requirements laid out in 19 CFR 351.408(c)(1). Due to the fact that the Department has already acknowledged the appropriateness of CUMI's data by relying on CUMI's financial statement to derive surrogate values for factory overhead expenses, general and administrative expenses, and profit to calculate the preliminary determination margin, the petitioners contend that the CUMI price quote is the most appropriate surrogate value for the CBAO.

In the event that the Department decides not to use the CUMI price quote, the petitioners argue that the surrogate value used by the Department in its preliminary determination is superior to the surrogate values suggested by both the respondent and the interested third parties. In response to the interested third parties' contention that the U.S. import statistics are unreliable because they are largely based on transactions between one of the petitioners and its Canadian affiliate, the petitioners argue that no evidence has been presented which demonstrates that these transaction values differ from those of

comparable sales between unaffiliated parties. In fact, the petitioners note that arm's-length affiliated party sales can be used to determine normal value.

Jinyu and the interested third parties respond that the CUMI quote is unreliable, as it was obtained solely for the purposes of this investigation and thus cannot be used for purposes of valuing the CBAO. Specifically, as pointed out by the interested third parties, the CUMI price quote was a spot price that was provided to a petitioner in response to a petitioner's request. Furthermore, Jinyu notes that no evidence has been presented with regard to what CUMI charges companies in India for the CBAO. Jinyu also argues that the Department's practice is to rely on prices actually paid by, not prices offered to, Indian companies. As the CUMI price was quoted to a company in another country (i.e., the United Kingdom), it falls outside of this range.
The interested third parties also note that the Department has a preference for using publicly available information when valuing FOPs. However, since producers are generally reluctant to reveal to potential customers the prices quoted to other customers, the interested third parties contend that the privately-obtained CUMI quote is not publicly available information. The interested third parties point out that, in the preliminary determination, the Department rejected a spot price that was generated specifically in response to an email where the sender was identified as a U.S. government official conducting an antidumping duty investigation. The interested third parties argue that a price quote generated specifically for the purpose of an antidumping duty investigation in response to a petitioner's request has the same unreliability.

In response to the petitioners' argument that the DLA price is not contemporaneous with the POI, the interested third parties note that the Department has in the past selected less contemporaneous but higher quality data. See, e.g., Notice of Final Determination of Sales At Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine, 67 FR 55785 (August 30, 2002), and Notice of Final Determination of Sales At Less Than Fair Value: Urea Ammonium Nitrate Solutions from the Russian Federation, 68 FR 9977 (March 3, 2003). Moreover, in response to the petitioners' argument that neither the DLA price nor the Bisley price quote should be used because they do not originate in market economies at a comparable level of economic development as the PRC, the interested third parties maintain that the Department is not confined to using data obtained from the surrogate value country in valuing all FOPs. They argue that, where it is impossible to obtain market-economy costs for all FOPs from a single surrogate country, the Department may use other publicly available sources for valuing one or more of the FOPs. Finally, with regard to the petitioners' argument that the DLA price is not reflective of ordinary sales between typical buyers and sellers, the interested third parties point out that the DLA is required by statute to dispose of inventory in excess of its stockpile requirements by selling or bartering the excess materials at fair market value (see 50 USC Section 98e). They argue that the petitioners have provided no support for their claim that the DLA did not act in accordance with this law.

DOC Position:

In examining surrogate values, the Department looks for, where possible, publicly available values which are (1) non-export values; (2) representative of a range of prices within the POI or most contemporaneous with the POI; (3) product-specific; and (4) tax-exclusive. In selecting the surrogate values, we consider the quality, specificity, and contemporaneity of the data (see, e.g., Preliminary Determination at 23970). While it is the Department's preference to value all FOPs from a single surrogate country, the Department has relied on data from other countries, including those at a different level of economic development, when there is no appropriate data from the selected surrogate country. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China, 59 FR 55625, 55632 (November 8, 1994). As we discussed in the Preliminary Determination, we were unable to identify a suitable surrogate value for CBAO from India or any other comparable economy. For the Preliminary Determination, we relied on a value derived from U.S. import statistics of CBAO from Canada because it was the best available information at the time to value this input.

Subsequent to the Preliminary Determination, parties to the proceeding provided three additional CBAO surrogate values for consideration, as described above. None of the CBAO value options on the record of this investigation represents an ideal source. Accordingly, we have had to select a surrogate value that we consider to be the best among these options. Based on our analysis, we have determined that the DLA weighted-average price for the 2000 fiscal year, adjusted for inflation to the POI, represents the best available information to value CBAO, as it is a non-export, tax-exclusive, product-specific value that is representative of a range of prices. While it is not as contemporaneous with the POI as the value of U.S. imports from Canada, it is from a period not far removed from the POI that can be readily adjusted to reflect the POI. More importantly, the DLA price represents arm's-length transactions, while the U.S. import value represents transfers from the petitioner Washington Mills' Canadian facility to its U.S. facilities. For that reason, we find the DLA price to be superior to the U.S. import value.

We agree with the interested third parties and Jinyu that there is no evidence that the DLA inventory was sold outside the ordinary course of trade. These parties noted that the DLA is required by law to sell its inventory at market prices and the petitioners failed to show that the DLA acted contrary to law, or that its inventory was defective in any way such that it was not sold at market prices.

Although the CUMI price quote is from an Indian producer, it is a single spot quote for an export sale to an affiliate of a petitioner. As noted by the interested third parties, the Department rejected a CBAO value based on a spot offer from a Brazilian producer because of concerns regarding its reliability in the context of this antidumping investigation (see the April 29, 2003, Preliminary Determination Valuation Memorandum at page 3). We have the same concerns with this value, particularly as it is a price quote obtained during the course of this investigation by a petitioner. Further, the offer reflects an export price, while the Department preference is for either an import value or a domestic price (see, e.g., Final

Results of New Shipper Administrative Review: Glycine from the People's Republic of China, 66 FR 8383 (January 31, 2001), accompanying Issues and Decision Memorandum at Comment 1). In this case, we have better import and domestic values available as alternatives.

We have not considered the Bisley price quote to be an appropriate surrogate value. As discussed at the Department's hearing, although Jinyu has presented this quote as one for Australian material from an Australian producer, the actual quote from this source does not specify either the producing company or the country of origin of the CBAO (see August 20, 2003, hearing transcript at pages 24-27, and 34). As such, we cannot be certain that the quote is that of a market-economy product from a market-economy supplier.

Comments 4: *Application of Verification Findings*

At verification, the Department found that Jinyu had omitted one sale of subject merchandise from its reported U.S. sales listing. The Department also found that Jinyu had allocated electricity consumption across all three of Jinyu's production lines, including silicon carbide production located at a different site from that of its aluminum oxide production. Finally, the Department found that Jinyu based its per-unit labor consumption on a per-shift production figure which was based on production line capacity rather than actual production. For a discussion of these findings, see the Department's July 30, 2003, Verification Report (Verification Report).

The petitioners argue that the one sale which respondent Jinyu omitted from its reported U.S. sales listing should be added to Jinyu's overall sales listing for purposes of calculating its margin in the final determination. The petitioners also argue that the Department should revise Jinyu's reported consumption of electricity by allocating its electricity consumption to its on-site production of brown and white aluminum oxide only. Finally, the petitioners argue that the Department should recalculate respondent Jinyu's reported labor consumption based on actual production data.

Neither Jinyu nor the interested third parties commented on these issues.

DOC Position:

As discussed in the Verification Report, the one sale of subject merchandise omitted by Jinyu amounted to 1.5 percent of the total POI sales quantity from its reported sales listing. In light of the small quantity of the missing sale, and the fact that it was not reported due to an inadvertent clerical error, we agree with the petitioners and have included this missing sale in Jinyu's margin calculation for the final determination. Consistent with our approach in the Final Determination of the Antidumping Duty of Stainless Steel Bar from France, 67 FR 3143 (January 23, 2002), accompanying Issues and Decision Memorandum at Comment 4, because we did not obtain a full set of sales data for this sale at verification, we have applied facts available under section 776(a)(1) of the Act, where necessary, in

calculating the margin. See September 18, 2003, Memorandum to the File entitled Jinyu Final Determination Margin Calculation for a further discussion.

With regard to electricity, Jinyu's electricity consumption was allocated across all three of Jinyu's production lines, including silicon carbide production located at a different site from its aluminum oxide production. However, Jinyu was unable to support its claim that the electricity meter reading totals included the meter at the silicon carbide site as well as the brown and white aluminum oxide site. Therefore, the Department recalculated Jinyu's electricity consumption across the production of the two aluminum oxide products. See pages 10-11 of the Verification Report.

Finally, Jinyu's labor calculations were derived from a per-shift production figure that was based on production line capacity rather than actual production, which was about two-thirds less than capacity. The Department considers a more accurate calculation of the labor figure to be based on Jinyu's actual production figures. Accordingly, the Department has recalculated labor consumption based on actual production data. See pages 11-12 of the Verification Report.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination and the final weighted-average dumping margins in the Federal Register.

Agree____ Disagree ____

_____

James J. Jochum
Assistant Secretary
for Import Administration

_____

(Date)